

From: Patterson
To: Microsoft ATR
Date: 1/28/02 1:08pm
Subject: Microsoft Settlement

VIA E-MAIL

The Honorable Colleen Kollar-Kotelly
United States District Court
for the District of Washington, D.C.
c/o United States Department of Justice
Washington, D.C.

Dear Judge Kollar-Kotelly:

For the following reasons, I feel compelled to add my voice to those arguing AGAINST Your Honor approving of the Proposed Final Judgment (the "PFJ") entered into by the United States of America and several of the States as plaintiffs and the Microsoft Corp. as defendant (the "Defendant" or "Microsoft") in the antitrust case known as U.S. vs. Microsoft Corp.

Judge Thomas Penfield Jackson found Microsoft guilty of being a monopoly and of abusing its monopoly powers, among other things, and he ordered that Microsoft be broken up into a number of separate companies, as well as other remedies. On appeal, the U.S. Court of Appeals for the D.C. Circuit, in a 7-0 decision, overturned several of Judge Jackson's rulings and vacated his proposed remedies, but the Court of Appeals let one of Judge Jackson's core rulings stand: Microsoft possesses monopoly power and unlawfully used that power to protect its monopoly. Both Microsoft's request to the Court of Appeals for a rehearing and its petition to the United States Supreme Court for certiorari have been denied, so nothing changes the fact that Microsoft is a monopoly and used its monopoly power unlawfully. Now the question arises: What are the proper remedies in the case in question?

The quick answer is that the proper remedies are NOT those set forth in the PFJ. Notwithstanding The Honorable Attorney General's pre-nomination pledge not to go "too easy" on Microsoft, the U.S. (and some of the States) and the Defendant have entered into a "sweetheart deal" by entering into the PFJ. Numerous financial analysts and computer industry experts agree that, under the terms of the PFJ, the Defendant would conduct "business as usual" should Your Honor approve the PFJ.

Too often, we forget the purpose of remedies. Sure, there should be a rehabilitative component-- i.e., the remedies to be applied should mandate or at least encourage the wrong-doer to reform its wrongful ways. But that fails to see the forest for the trees. There should also be a punitive component-- i.e., the remedies applied should also mete out a punishment for the injurious conduct that the wrong-doer engaged in, if only BECAUSE there was, in fact, wrongful conduct and concomitant harm.

In the situation before Your Honor, there is no doubt that Microsoft, the defendant, is in the wrong (it is a monopoly) and has engaged in wrongful conduct (it used its monopoly powers to harm the public). The PFJ's terms are simply too generous to the Defendant and provide few rehabilitative provisions and little if any punishment.

Right now, being the de facto monopoly in desktop operating systems, Microsoft simply has no competition. The same could be said of Microsoft's network operating system (at least for the Intel

platform). Similarly, Microsoft is the de facto monopoly in desktop application software suites (i.e., its Office suite comprised of word processor, spreadsheet, presentations, database, personal information manager, etc., in various combinations and price levels). The situation will only get worse and Microsoft's monopoly become even greater if the powers that be allow Microsoft to implement its .Net and web services strategies. And that is what the PFJ allows: Microsoft will make some minor-- mainly cosmetic concessions -- to its desktop operating system, but the PFJ leaves Microsoft's monopolistic business practices virtually untouched.

With all due respect, Your Honor should also review and take into consideration the Defendant's past conduct when the U.S. entered into a settlement with it and tried to rehabilitate positively its business practices: Microsoft flouted the spirit (if not the actual provisions) of previous formal or informal settlements with the U.S. and never really changed its wrongful business practices. Out of Microsoft's failures to rehabilitate its business practices arose the current antitrust litigation.

Looking at the situation from another angle, Microsoft had its opportunity to "go straight" and consciously did not. (For some reason, analogies to the criminal side of jurisprudence keep coming unbidden to mind.) The Defendant was on probation, if you will, and then proceeded to openly violate probation. To add insult to injury, the Defendant as probationer is unrepentant about its continued wrongful behavior and violation of probation.

Has the Defendant slowed its openly-stated monopolistic strategies? No! Microsoft rushed to market its newest desktop operating system, Windows XP, and is rushing to market its software that implements its .Net strategy. In so doing, the Defendant apparently hopes that it can "beat the system" by relying upon and cynically utilizing the slow pace of our great system of justice.

Now is not the time to go easy on the Defendant, Your Honor. This is NOT a case of a first offender, Your Honor, where some leniency may be in order. Just as I am confident that Your Honor would NOT go easy on an unrepentant repeat criminal offender, Your Honor should NOT go easy on the Defendant.

In truth, however, the only competition Microsoft has is its own internal divisions. The network operating systems division vs. the desktop operating system division vs. the application suite division vs. the network operating system support software, etc., etc. A break-up of Microsoft is a perfect remedy in that regard. A break-up of Microsoft along product lines provides an appropriate remedy with both rehabilitative AND punitive components.

I am sure that Your Honor is considering all possible options in fashioning an appropriate remedy. I am also sure that any remedy Your Honor ultimately imposes will be well-considered and carefully crafted. I cannot know what the exact terms of Your Honor's ultimate remedy will be, but I do know one thing: The PFJ comes nowhere near constituting an adequate remedy for Microsoft's sustained and egregious monopolistic conduct in the case at hand.

For the above reasons, as well as those voiced by others, I respectfully implore Your Honor NOT to approve the PFJ in the U.S. vs. Microsoft Corp. case.

Respectfully yours,

Bob Patterson

